WINSTON RAJAH

v.

PP

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RICHARD MALANJUM J
[CRIMINAL APPEAL NO: K 41-01 OF 1998]
16 NOVEMBER 1998

CRIMINAL PROCEDURE: *Sentence - Minimum sentence - Whether minimum sentence imposed on conviction for specific offence equally applicable to conviction for attempt of that offence - Penal Code, ss. 379A & 511*

CRIMINAL PROCEDURE: *Sentence - Binding over - Offence punishable by mandatory imprisonment - Whether existence of minimum sentence deprives court from exercising discretion under s. 294 of the Criminal Procedure Code - First offender of seemingly good character - Whether exercise of discretion justified in the circumstances*

This was an appeal against sentence for the offence of attempted theft of a motor vehicle under s. 511 read with s. 379A of the Penal Code ('the Code'). Firstly, the appellant contended that the learned magistrate had misdirected herself in law by holding that, in view of s. 379A of the Code, the minimum sentence to be imposed even for an offence of attempted theft of a motor vehicle should be twelve months imprisonment. It was argued that there should not be a minimum sentence for an offence of attempt as s. 511 of the Code did not provide for such. Secondly, the appellant asserted that the sentence was excessive in the light of the following: (i) he had pleaded guilty; (ii) he is a first offender; (iii) his antecedent character and present situation should be taken into account; (iv) the vehicle was recovered; (v) the appellant was attacked and wounded by the complainant during the incident; (vi) there was no public outrage on this type of offence; and (vii) the prosecution did not press for a deterrent sentence. Based on these, the appellant urged the court to accord him the benefit of s. 294 of the Criminal Procedure Code and release him on probation.

Held:

[1] The punishment prescribed in s. 511 of the Code must necessarily be linked to the penalty provided under s. 379A thereof. There is no ambiguity in s. 511 of the Code as regards punishment in spite of the absence of a specific inclusion of a minimum sentence. In so far as the penalty is concerned, s. 511 of the Code takes its colour from s. 379A of the Code. Accordingly, the minimum term of imprisonment under s. 379A of the Code is equally applicable on conviction for an attempt under s. 511 of the Code.

[2] The existence of a minimum sentence does not deprive the court from exercising its discretion under s. 294 of the Criminal Procedure Code.

[2a] Based on the fact that the appellant is a first offender and that currently he is undergoing a course in computer, an immediate custodial sentence may not be appropriate. The healthy activities the appellant had participated in before reflects his antecedent and character to a certain extent.

[2b] The sentence of twelve months imprisonment in this case, though mandatory, is excessive in the circumstances. Hence this is a proper case to invoke s. 294 of the Criminal Procedure Code.

[Appeal allowed.]

Cases referred to:
Davey v. Lee [1967] 3 WLR 105 ***(refd)***
Hassan Dollah v. PP [1996] 5 MLJ 285 ***(aff)***
Jayanthan v. PP [1973] 2 MLJ 68 ***(foll)***
Kennedy v. Spratt [1971] 2 WLR 667 ***(aff)***
Munah Ali v. PP [1958] MLJ 159 ***(refd)***
Nordin Yusmadi Yusoff v. PP [1997] 4 CLJ 25 ***(cit)***
PP v. Chew Jim [1950] MLJ 203 ***(refd)***
PP v. Mohd Tajuddin Ahmad (unreported)
PP v. Onn [1969] 1 MLJ 4 ***(refd)***
PP v. Yee Kim Seng [1983] 1 CLJ 38 ***(aff)***
Re Ooi Chan Onn [1965] 1 MLJ 77 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 294
Penal Code, ss. 379A, 511

For the appellant - Jonathan Yassin; M/s Donald Mojuntin & Seibing Gunting
For the respondent - Duncan Sikodol, DPP

Reported by Cindy Chan

JUDGMENT

Richard Malanjum J:

Background Facts

This is an appeal by the appellant against his conviction and sentence on a charge of attempted theft of a motor vehicle under s. 511 read with s. 379A of the Penal Code. At the outset of the hearing learned counsel for the appellant informed the court that his client did not wish to proceed with the appeal against his conviction. Hence the hearing only dealt with the appeal against sentence.

On his conviction pursuant to his own plea of guilty the appellant was sentenced to a term of imprisonment of twelve (12) months. In passing sentence the learned magistrate was of the view, *inter alia*, that the minimum sentence to be imposed should be twelve months imprisonment by virtue of the provision under s. 379A of the Penal Code.

The charge against the appellant reads as follows:

> Bahawa kamu, pada 01hb. December, 1997, lebih kurang jam 04.00 pagi, bertempat di belakang Sabah Oxygen Kolombong batu 5½ Jalan Tuaran, didalam daerah Kota Kinabalu, didalam Negeri Sabah, cuba mencuri kereta Pick Up Nombor pendaftaran SS1967B jenis Ford, warna kuning, kepunyaan Aloh Bin Alias (L) 29 tahun dan telah dalam percubaan itu telah melakukan suatu perbuatan iaitu menghidupkan injin kereta tersebut, tanpa izinnya dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 379A Kanun Keseksaan dibaca bersama seksyen 511 undang-undang yang sama.

And as indicated in the charge, the appellant admitted that on the day, time and place mentioned therein he was inside the motor vehicle registration number SS 1967, a pick-up of Ford Model. He was in the process of trying to start the engine when the complainant apprehended him. Subsequently the appellant was handed over to the police. On examination of his person he was found to be in possession of three keys, one of which he was using to start the vehicle.

In his mitigation the appellant pleaded for a lenient sentence as it was his first offence. He also promised not to do it again.

In her grounds of decision the learned magistrate stated thus, *inter alia*,:

> … Before sentencing I took the following into consideration:
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> The charge against the accused is attempted theft of a Pick-Up Reg. No. SS1967B. This offence is punishable with imprisonment not more than seven years, and shall also be liable to fine. Since this case falls under Sec. 511 Penal Code the imprisonment imposed shall not exceed one a half of the longest term provided for the offence.
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> I gave due consideration to the fact the accused pleaded guilty because by doing so he saved a lot of courts time and the prosecution considerable expenses. I also take into account the fact that he is a first offender *(sic)*. I could have passed a heavier sentence if not for the above facts.
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> Although the accused is a first offender, the court sees it fit to send the accused to prison so as to make him realise that what he has previously working as a security guard. This in my opinion is really a case of "harapkan pagar, pagar makan padi."

In the event, I sentenced the accused to 12 (twelve) months imprisonment with effect from date of arrest which is the minimum sentence provided for by this section.

The Grounds Of Appeal

As against the sentence the appellant is dissatisfied in that:

2. (T)he learned magistrate erred in law and in fact in sentencing the appellant on the grounds that:-

(a) the sentence is manifestly severe and excessive in the circumstances;

(b) failed to take into account that the subject of the attempted theft was recovered back;

(c) there was no evidence tendered to prove as to the public outrage over this type of offence committed in Sabah.

The Contentions

Firstly, learned counsel for the appellant contended that the learned magistrate misdirected herself in law when she held that the minimum sentence to be imposed even for an offence of attempted theft of a motor vehicle should be twelve months imprisonment in view of the provision under s. 379A of the Penal Code. Learned counsel argued that there should be no minimum sentence for an offence of attempt as s. 511 does not provide for such. To do so, learned counsel submitted, would make that section superfluous.

Secondly, learned counsel submitted that there should be discount given due to the plea of guilty by the appellant.

Thirdly, learned counsel argued that the appellant is a first offender. His antecedent character and present situation should be taken into account in passing sentence.

Fourthly, learned counsel pointed out that there are other factors which should be considered, namely, (1) the vehicle was recovered; (2) the appellant was attacked and wounded by the complainant during the incident; (3) there was no evidence of public outrage on this type of offence and (4) the prosecution did not press for a deterrent sentence.

Meanwhile, the learned Deputy Public Prosecutor submitted that even though the penalty is mandatory in nature, there is still discretion of the court to invoke the provision of s. 294 of the Criminal Procedure Code. He cited several cases to support that preposition such as *Nordin Yusmadi Yusoff v. Public Prosecutor* [1997] 4 CLJ 25 and one yet to be reported, namely, *Public Prosecutor v. Mohd. Tajuddin bin Ahmad* (MRRJ No. 5-78-96) (unreported). However, in the instant case the learned deputy argued that the sentence passed by the learned magistrate was appropriate in the given circumstances.

Findings

At first glance this case appears to be just another appeal case against sentence. However, the first point raised by the learned counsel for the appellant has caused some anxious consideration. Hence, I was of the view that such issue should be examined in greater detail. The question is whether a minimum sentence imposed on conviction for a specific offence (in this case the offence of theft of a motor vehicle) is equally applicable to a conviction for attempt of that offence. That point may not have been clearly addressed to in the petition of appeal. But I think ground 2(a) therein is wide enough. And in order for me to be able to rule whether or not the sentence imposed upon the appellant is excessive, it should firstly be considered whether or not the learned magistrate was correct in her interpretation of the relevant statutory provisions.

Now, ss. 379A and 511 read as follows:

Section 379A:

> (1) Whoever commits theft of a motor vehicle or any component part of a motor vehicle shall be punished with imprisonment for a term of not less than one year and not more than seven years, and shall also be liable to fine.
>
> (2) ...

Section 511:

> Whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of such offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence: Provided that any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence.

There is no problem on the maximum punishment that can be imposed on a conviction for an offence of attempt. But it arises when there is a minimum punishment provided for as in the instant case. And *prima facie* the contention of learned counsel for the appellant is quite logical. For instance, it would appear to be quite harsh that a person who is only convicted for attempt has to suffer the same punishment as those who have committed the offence wholly. And surely the fact that the maximum penalty that can be imposed on conviction for attempt is only half of the maximum imprisonment due to a completed offence should indicate that an attempt is of lesser culpability. After all an offence of attempt is as much an offence on its own. This can be seen from some of the decided cases.

In the case of *Re: Ooi Chan Onn* [1965] 1 MLJ 77 his Lordship Ong J said this, *inter alia*,:

> ... In my opinion, a person convicted of attempted theft is convicted of the offence of an attempt, which must be clearly distinguished from the offence of actual or completed theft.
>
> The punishment for the offence of attempted theft is laid down in s. 511 of the Penal Code, which provides that the offence of an attempt shall be punished with such punishment as is provided for the completed offence but that any term of imprisonment shall not exceed one-half of the longest term provided for the offence. This means that whatever the penalty provided for an offence, the attempt to commit such offence is similarly punishable, except that as regards imprisonment, the term imposed shall not exceed half of the maximum term provided for the completed offence.

Similar view was also expressed in the case of *Munah bte Ali v. Public Prosecutor* [1958] MLJ 159 where his Lordship Thomson CJ in his dissenting judgment at p. 161 said:

> It will be observed that s. 511 does not define an attempt. It only states what attempts are themselves offences. It says in effect that before an attempt is itself an offence it must satisfy two conditions. The first of these is that it must be an attempt to commit an offence punishable by the Code or by any other written law. The other is that there must be an act towards the commission of the offence.

It follows that the provision of s. 511, although general in nature, should be considered on its own instead of merely reading it as an appendix to another provision. Moreover, the offence of attempt does have its own ingredients as may be noted from what Lord Parker CJ said in *Davey v. Lee* [1967] 3 WLR 105 at p. 108:

> The real point taken by Mr. Whitfield is that of course an intention to steal is not sufficient to constitute an attempt, but there must be acts which have moved further than being merely preparatory acts. What amounts to an attempt has been described variously in the authorities, and for my part I prefer to adopt the definition given in *Stephen's Digest of the Criminal Law*, 5th ed. (1894), art. 50, where it says that:
>
> > An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.
>
> As a general statement that seems to me to be right, although it does not help to define the point of time at which the series of acts begins. That, as Stephen said, depends upon the facts of each case.

A helpful definition is given in para. 4104 in the current (36th) edition (1966) of *Archbold's Criminal Pleading, Evidence and Practice*, where it is stated in this form:

> It is submitted that the *actus reus* necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of the specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime.

However, notwithstanding the foregoing and persuasive it may be the argument, there is one important consideration to note, namely, the actual wordings of s. 379A and s. 511 from which the intention of the legislature may be ascertained. Thus, it may be appropriate here to recall what were said by their Lordships in the case of *Kennedy v. Spratt* [1971] 2 WLR 667:

> We are as always trying to find the intention of the legislature. Where, taking into account the surrounding circumstances and the likely consequences of the various possible constructions, there can be any doubt at all about that intention, we must where penalties are involved require that the intention shall clearly appear from the words of the enactment construed in light of those matters. But if we can say that those matters show that a particular result must certainly have been intended, we would, I think, be stultifying the underlying principle if we required more than that the statutory provisions are reasonably capable of an interpretation carrying out that intention. per Lord Reid at p. 671.

And Lord Diplock made a similar remark when he said this at p. 679:

> I think when a statute requires that a person who is convicted of an offence shall be sentenced to imprisonment for a specified minimum period, the natural meaning of the words "shall be sentenced to imprisonment" is that he shall be punished for that offence by being sent to prison. I do not think that this requirement is satisfied by any order of a court which does not have this effect.

Such approach seems to be too strict and harsh. But his Lordship Roberts CJ (Brunei) in the case of *Hassan bin Dollah v. Public Prosecutor* [1996] 5 MLJ 285 at p. 292 explained it in this way:

> It is a matter for those who make the laws in any country to decide which offences are to be regarded as serious by the courts, whose duty it is to interpret and apply those laws.

And nearer home his Lordship Ajaib Singh J (as he then was) in the case of *Public Prosecutor v. Yee Kim Seng* [1983] 1 MLJ 252 at p. 254 opined thus:

> The courts are concerned with the administration of law and they are obliged to administer the law as it is found in the statute books.

Hence, it is pertinent to examine the wordings of the two sections when considering the first point of the learned counsel for the appellant. And having done so I must say that though the argument of the learned counsel for the appellant is indeed appealing the clear words of the sections do not allow me to accede to his view. The punishment prescribed in s. 511 must necessarily be linked to the penalty provided under s. 379A thereof. Furthermore, I do not find any ambiguity in s. 511 as regards punishment in-spite of the absence of a specific inclusion of a minimum sentence. In my view s. 511 in so far as the penalty is concerned takes its colour from s. 379A. The phrase "… shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence" in s. 511 should clear any doubt on the applicability of the punishment as provided in s. 379A.

Accordingly, it is my judgment that the minimum term of imprisonment under s. 379A is equally applicable on conviction for attempt under s. 511 of the Penal Code. It follows that the learned magistrate was not in error on her interpretation of the relevant provisions. And that should end this appeal but for the other points raised by learned counsel for the appellant.

As regards those other points, I should deal with them together as they relate to the sentence imposed. Now, learned counsel for the appellant urged this court that his client should be given the benefit of s. 294 of the Criminal Procedure Code.

The learned deputy in accord with the highest tradition of the Bar cited several authorities indicating that the existence of a minimum sentence does not deprive this court from exercising its discretion under s. 294. I have no reason to doubt the correctness of such principle of law. The remaining question is whether the given facts and circumstances in the instant case justify such exercise.

In the case of *Jayanthan v. Public Prosecutor* [1973] 2 MLJ 68 at p. 69 his Lordship Ong Hock Sim FJ said this:

> Here, we would say we have no doubt that if a court were minded to send the offender to prison, it must, as enacted in s. 15(4) impose a term of not less than two years. Does the prescription of a maximum and a minimum term displace or override what Aitken J referred to as 'an absolute discretion as to whether it shall award a sentence of imprisonment or deal with the accused under and in accordance with the provisions of s. 294 of the Criminal Procedure Code?'

Section 294 reads:

294(i) When any person not being a youthful offender has been convicted of any offence punishable with imprisonment before any court if it appears to such court that regard being had to the character, antecedents age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties and during such period as the court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour.

This section vests the court before which a person is convicted with power to suspend sentence for such period as the court may direct, and, if the offender behaves himself during such period, he would escape punishment for his offence. If he fails to observe the conditions of his bond, he would be liable to be apprehended and dealt with for his original offence. As Thomson J (as he then was) said in *Public Prosecutor v. Idris* [1955] MLJ 234:

Section 294 which only applies in the case of adult offenders can only be made use of where a person has been convicted and where his conviction is for an offence punishable with imprisonment without the option of a fine.

I do not wish to lay down any hard and fast rule, which in any event would be difficult to prove, but magistrates would be well-advised only to make use of s. 294 where an offence which is generally of a serious nature and which is punishable with imprisonment has been committed by an adult offender and where it is considered desirable to place him on probation.

In our view, if the legislature intended that s. 294 is to cease to have application in respect of an offence under s. 15 of the Prevention of Crime Ordinance, it should be so expressed in the clearest possible language. We can find no such provision.

Another illuminating case is *Public Prosecutor v. Chew Jim* [1950] MLJ 203 where his Lordship Thomson J (as he then was) remarked thus:

As regards s. 294 of the Criminal Procedure Code, that section provides that binding over may be substituted for imprisonment if it appears to the court that such substitution is "expedient" regard being had to the character, the antecedents, the age, the health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed. As I had occasion to observe in Criminal Appeal No: 38 of 1949, [See [1949] MLJ 231] "each individual case must be considered on its merits and must be examined with a view to ascertaining whether having regard to any of the matters mentioned in s. 294 binding over is in all the circumstances of the case expedient."

In the later case of *Public Prosecutor v. Onn* [1969] 1 MLJ 4 at p. 5 his Lordship Ali J (as he then was) expressed similar view when he said this:

a It is to be observed that s. 294(1) of the Criminal Procedure Code applies to the circumstances in which a person, not being a youthful offender, has been convicted of any offence punishable with imprisonment. The effect of the bond ordered under this section is to suspend the sentence of imprisonment and it is, therefore, not objectionable to include any of the conditions set out in s. 294A, punitive though they may be in effect.

b Reverting therefore to the present case I am of the view that based on the fact that the appellant is a first offender and that currently he is undergoing a course in computer, an immediate custodial sentence may not be appropriate. His learned counsel in his submission has also listed and annexed copies of c certificates or documents to show the healthy activities the appellant had participated before. And I think those should reflect his antecedent and character to a certain extent. It was unfortunate that the learned magistrate did not have the benefit of those materials. But then the appellant was not represented at that stage. I also note that s. 294 was not even considered or d discussed in the court of first instance.

I am aware that as an appellate court the reason or ground to interfere a sentence passed by the trial court is quite restricted. But in this case I am of the view that the sentence of twelve (12) months imprisonment though it is mandatory is excessive in the circumstances. Hence this is a proper case and e I think it is expedient that s. 294 should be invoked. I therefore set aside the sentence of imprisonment imposed upon the appellant and in lieu thereof that he be put on bond of good behaviour for a period of three years in the sum of RM5,000 with RM1,000 deposited and with one local surety. To that extent this appeal is allowed.

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